55

NOV 27 195

HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 483

UNITED STATES GYPSUM COMPANY, A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

CHARLES M. PRICE,
HAROLD D. BURGESS,
Attorneys for Petitioner,
134 South La Salle Street,
Chicago 3, Illinois.

Of Counsel:
MACLEISH, SPRAY, PRICE & UNDERWOOD,
134 South La Salle Street,
Chicago 3, Illinois.

THE BLAKELY-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Petition for Writ of Certiorari	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	5
Statement of the Case	6
Reasons for Granting the Writ	12
Point 1	12
Point 2	15
Point 3	17
Point 4	18
Appendix A	25

Cases Cited.

Cathey Lumber Company, 86 N. L. R. B. 157, No. 30	13
Communications Assn. v. Douds, 339 U. S. 382	18
Cusano v. N. L. R. B., 190 F. 2d 898, 903 (C. A. 3, May 22, 1951)	16
Indiana Metal Products Corp. v. N. L. R. B., 202 F. 2d 613, 619 (C. A. 7, Mar. 10, 1953)	12, 16
Isaac Andrews, et al., 87 N. L. R. B. 379	21
Joanna Cotton Mills Co. v. N. L. R. B., 176 F. 2d 749, 754 (C. A. 4, Aug. 10, 1949)	12
Kansas Milling Co. v. N. L. R. B., 185 F. 2d 413 (C. A. 10, Dec. 11, 1950)	12
Labor Board v. Highland Park Mfg. Co., 341 U. S. 322, 325 (May 14, 1951)	19

Labor Board v. I. & M. Electric Co., 318 U. S. 9, 17 (Jan. 18, 1943) 13

National Licorice Co. v. Labor Board, 309 U. S. 350, 369 (Mar. 4, 1940) 13

New Jersey Carpet Mills, Inc., 92 N. L. R. B. 604 21

N. L. R. B. v. Atlanta Journal, 187 F. 2d 13 (C. A. 5) .. 15

N. L. R. B. v. Brown & Root, Inc., 203 F. 2d 139, 146 (C. A. 8, March 24, 1953) 16

N. L. R. B. v. Case Company, 189 F. 2d 599 (C. A. 8, June 5, 1951) 18

N. L. R. B. v. Cathey Lumber Company, 185 F. 2d 1021 (C. A. 5, Jan. 22, 1951) 13

N. L. R. B. v. Dant, 344 U. S. 375 ..... 11, 19, 21, 22

N. L. R. B. v. Dinion Coil Co., 201 F. 2d 484, 491 (C. A. 2, Dec. 24, 1952) 16

N. L. R. B. v. Epstein, 203 F. 2d 482, 485 (C. A. 3, April 15, 1953) 16

N. L. R. B. v. Gaynor News Company, Inc., 197 F. 2d 719, 721 (C. A. 2, June 24, 1952) 16

N. L. R. B. v. Globe Wireless, Ltd., 193 F. 2d 748, 752 (C. A. 9, Dec. 27, 1951) 12

N. L. R. B. v. Harris, 200 F. 2d 656, 658 (C. A. 5, Jan. 5, 1953) 15, 16

N. L. R. B. v. Itasca Cotton Mfg. Co., 179 F. 2d 504, 506 (C. A. 5, Jan. 30, 1950) 13

N. L. R. B. v. Kobritz (Star Beef Company), 193 F. 2d 8, 15 (C. A. 1, Dec. 17, 1951) 12

N. L. R. B. v. New York Merchandise Company, 134 F. 2d 949, 952 (C. A. 2, Mar. 15, 1943) 18

N. L. R. B. v. Pennwoven, Inc., 194 F. 2d 521, 524 (C. A. 3, Feb. 4, 1952) 12

N. L. R. B. v. Postex Cotton Mills, Inc., 181 F. 2d 919, 920 (C. A. 5, May 5, 1950) 18

N. L. R. B. v. Royal Palm Ice Co., 193 F. 2d 569, 570 (C. A. 5, Jan. 11, 1952) 15

N. L. R. B. v. Somerset Classics, Inc. (Modern Mfg. Co.), 193 F. 2d 613, 615 (C. A. 2, Jan. 14, 1952) 16

N. L. R. B. v. Vare (McCarron Co.), 206 F. 2d 543 (C. A. 3, July 21, 1953) 16

N. L. R. B. v. Westex Boot & Shoe Co., 190 F. 2d 12, 13-14 (C. A. 5, June 25, 1951) 13

Phelps-Dodge Corp. v. Labor Board, 313 U. S. 177, 200 18

Stokely Foods, Inc. v. N. L. R. B., 193 F. 2d 736, 738-9 (C. A. 5, Jan. 11, 1952) 13

United States v. American Trucking Association, 310 U. S. 534, 543 20

STATUTES CITED.

Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. A. Sec. 141, Supp. 1952) 5, 25

Section 7 ..... 7, 8, 25

Section 8(a)(1) 6, 7, 8, 25

Section 8(a)(3) 7, 25

Section 8(a)(5) 7, 26

Section 9(f) 4, 5, 6, 10, 20, 21, 26

Section 9(g) 4, 5, 6, 10, 18, 20, 21, 28

Section 9(h) 4, 5, 6, 10, 20, 21, 28

Section 10(b) 2, 3, 5, 12, 13, 14, 29

Section 10(e) 10, 29

United States Code, Title 28, Section 1254(1) 2

MISCELLANEOUS CITATIONS.

Legislative History of the Labor Management Relations Act, 1947, Vol. 1 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. .....

UNITED STATES GYPSUM COMPANY, A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Earl Warren, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner, UNITED STATES GYPSUM COMPANY, a Corporation, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on August 6, 1953, and the decree of said Court of Appeals, entered on October 27, 1953, enforcing in part an order of the National Labor Relations Board as amended.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 169-176) is reported in 206 F. 2d 410. The decision and order of the National Labor Relations

Board (R. 87-105) are reported in 94 N. L. R. B. 112, and the order of said Board amending said decision and order (R. 151-4) is reported in 97 N. L. R. B. 889.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, Section 1254(1), of the United States Code.

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 6, 1953, granting in part a petition for enforcement of an order of the National Labor Relations Board, as amended. (R. 176-7.) A timely petition for rehearing was denied on August 31, 1953 (R. 174), and a decree enforcing in part the order of the National Labor Relations Board, as amended, entered on October 27, 1953. (R. 184-7.)

QUESTIONS PRESENTED.

1. In order that the National Labor Relations Board may be authorized to issue a complaint with reference to an unfair labor practice which occurred more than six months prior thereto, is it not essential under the proviso in section 10(b) of the Labor Management Relations Act, 1947, that a charge stating such unfair labor practice with enough definiteness so that the particular unfair labor practice may be identified must have been filed with the Board and a copy thereof served upon the party against whom the charge is made not more than six months after the occurrence of such unfair labor practice, or that the unfair labor practice alleged in said complaint must relate to an unfair labor practice so stated in a charge so filed and served?

Can the conditions of the proviso in section 10(b) of the statute be fulfilled by the filing with the Board of an omni-

bus charge in which no identifiable unfair labor practice is alleged and service of a copy thereof upon the party against whom the charge is made?

2. Does the filing of an amended charge with the National Labor Relations Board and service of a copy thereof upon the employer in April, 1949, alleging that the employer discharged an employee on February 6, 1949 and since then refused to employ him because of union membership and union activity, although the Board finds that said employee had not been discharged but laid off lawfully on February 5, 1949 and that there was no obligation on the employer to re-employ him until some time subsequent to such charge, satisfy the conditions of the proviso in section 10(b) of the Labor Management Relations Act, 1947, so that following a failure of the employer to re-employ said employee in May or June of 1949 because of his union membership and union activity, the Board is empowered in April, 1950 to issue a complaint based upon such failure, pursuant to a second amended charge filed and served upon the employer at the time of issuance of the complaint?

Does the filing and service of an amended charge alleging an unfair labor practice which has not yet occurred, empower the Board more than six months after the subsequent occurrence of such unfair labor practice to issue, pursuant to a second amended charge filed and served more than six months after the occurrence thereof,* a complaint based upon such unfair labor practice?

3. Is it error for a United States Court of Appeals to enforce an order of the National Labor Relations Board for the payment of back pay to an employee who was not

* There is a question whether the complaint issued pursuant to the initial and the amended charge for the reason that the Board's notice of hearing stated "A copy of the second amended ~~complaint~~ CHARGE upon which the complaint is based is attached hereto" and there was no mention in the complaint of the prior charges.

re-employed for discriminatory reasons, prior to the time that the Board has determined the amount to be paid such employee, the date on which the employer was obligated** to re-employ such employee and from which the back pay is to be computed, or any definite basis for ascertaining the amount which will satisfy the enforcement order?

4. Is the National Labor Relations Board authorized to process a complaint issued pursuant to charges by an international labor union of interference by an employer by interrogation of employees concerning such international union and discrimination against an employee by reason of his membership in and activities as an officer of a local union at the employer's plant and issue a decision and order with respect to such matters during a period in which said international labor union, the charging party, is maintaining the local union, which has not complied with the provisions of sections 9(f) (g) and (h) of the Labor Management Relations Act, 1947, as its chartered local representative at said plant?

Did the United States Court of Appeals for the Fifth Circuit err in denying the motion of the employer for leave to adduce additional evidence with respect to the reorganization and existence during the pendency of a complaint before the Board of a noncomplying local union at the employer's plant, chartered and maintained by an international union, which was the charging party, on the ground that the evidence was not material since the local union was not reorganized and existing until after the complaint had issued?

** There is a question as to whether the Court erred in enforcing the Board's order to reinstate this employee for the reason that there is no evidence in the record that the employee at any time requested re-employment.

STATUTE INVOLVED.

The statute involved is the Labor-Management Relations Act, 1947, 49 Stat. 449 (1935) as amended, 61 Stat. 136 (1947), 29 U. S. C. A., Sec. 141, Supp. 1952, and in particular

(a) the proviso in section 10(b) of said Act, 61 Stat. 146, as amended, 62 Stat. 991, 29 U. S. C. A., Sec. 160:

> "*Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, * * *"

and

(b) the registration and affidavit provisions of sections 9(f)(g) and (h) of said Act, 61 Stat. 143, as amended, 65 Stat. 601, 29 U. S. C. A., Sec. 159.

The pertinent sections of the statute are printed in Appendix A, *infra,* pp. 25-31.

STATEMENT OF THE CASE.

Petitioner, United States Gypsum Company (herein referred to as "Company"), manufactures insulating board and hard board at its plant in Greenville, Mississippi. In the summer of 1948 the International Woodworkers of America, C. I. O. (herein referred to as "I. W. A.") began to organize this plant.

Because of the strike record of the I. W. A. at the plant of a competitor, Masonite Corporation, at Laurel, Mississippi, and other plants, the Company sought to persuade its employees not to choose the I. W. A. as their bargaining agent. The I. W. A. won the election, however, and was certified by the National Labor Relations Board (hereinafter called "Board") on September 27, 1948.

At the first negotiation meeting with the I. W. A. on January 27, 1949, the Company was advised that a local union had been organized. On February 9, 1949 the Company filed with the Board a motion to revoke the certification of the I. W. A. because the local union had not complied with sections 9(f)(g) and (h) of the Labor Management Relations Act, 1947. (R. 164, 165.) Subsequently the local came into compliance and on April 6, 1949 the Board denied the motion as then moot. (R. 166-7.)

In the meantime on February 21, 1949, the I. W. A. filed with the Board a charge that the Company had engaged in unfair labor practices within the meaning of section 8(a)(1) of the Act; interfered with its employees in the exercise of their rights to serve on the I. W. A. Negotiating Committee in contract negotiations; had made a unilateral wage increase; and "by other acts and conduct, * * * interfered with, restrained and coerced its employees in the

exercise of rights guaranteed in Section 7 of said Act". (R. 12-13.)

About the first of February 1949, the Company curtailed its operations for economic reasons which at that time similarly affected the entire insulation board industry. Many employees were laid off including a laborer, Hiram Peoples, who was laid off on February 5, 1949.

On April 25, 1949 the I. W. A. filed an amended charge that the Company had engaged in unfair labor practices within the meaning of sections 8(a)(1)(3) and (5) of the Act, reiterating its allegations with respect to interference with the right to serve on the Negotiating Committee and rights under section 7, and adding that the Company had discharged Hiram Peoples on February 6, 1949, and Flanigan Harper on April 10, 1949, and since those dates refused to employ them because of their membership and activities on behalf of the I. W. A. (R. 16-20.) Flanigan Harper was president and Hiram Peoples financial secretary of the local union. Prior thereto the Company had recalled Harper but he did not return because he had another job.

On April 17, 1950 the I. W. A. filed a second amended charge reiterating its general allegations of unfair labor practices within the meaning of sections 8(a)(1)(3) and (5) and interference with rights guaranteed in Section 7, omitting the charge of interference with the right to serve on the Negotiating Committee, and adding a general allegation that since August 21, 1948, the Company had interfered, etc., with its employees "in the exercise of their rights to self-organization * * * and to engage in concerted activities * * *" under Section 7 of said Act and, instead of the allegation of discharge of Peoples and Harper, that the Company laid off Hiram Peoples and Bennie Pearson on February 5, 1949 and Paul Johnson on January 26,

1949 and "since those dates has refused to employ them because of their membership and activities on behalf of" the I. W. A., and that the Company had refused to bargain. (R. 20-3.)

On April 17, 1950, the Board issued a complaint against the Company alleging among other things, in addition to the lay-off of the three employees named in the second amended charge and failure or refusal to reinstate them, that the Company had made statements and entered into conversations discouraging membership and activities among its employees in the I. W. A., interrogated its employees about their and other employees' membership and activities in behalf of the I. W. A. and as to how they were going to vote, and had made other threats and attempts to persuade employees to cease their union activities. (R. 24-30.) A notice of hearing before a Trial Examiner stating, "A copy of the second amended charge upon which the complaint is based is attached hereto", together with a copy of the complaint and copy of the said second amended charge, was served on the Company on April 18, 1950. (R. 31-2.)

No charge was served on the Company which apprised it of the interrogation of employees alleged in the complaint.

After answer and hearing the Trial Examiner made an Intermediate Report in which he stated that he had denied the motion of the Company "to dismiss that portion of the complaint alleging a discriminatory refusal to reemploy Johnson and Peoples and the 8(a)(1) allegations on the ground that they exceeded specifications in the charges"; found that the Company had by interrogation interfered with, restrained and coerced employees in violation of sections 7 and 8(a)(1) of the Act; that because of his small stature Peoples was of less value to the Company

during a period of reduced operations when employees might be shifted from job to job and was laid off on February 5, 1949 for economic reasons (R. 126), that by May or June, 1949, business had improved so that another was hired in Peoples' place, that the Company failed to recall Peoples because of his membership in and activity on behalf of the I. W. A. (R. 128); and that the termination of Pearson and failure to recall Johnson were because of their membership in and activities on behalf of the I. W. A. (R. 129-132.)

The Board issued its decision and order on May 1, 1951, overruling the Company's exceptions to the Intermediate Report, affirming the rulings and adopting the findings of the Trial Examiner except in so far as inconsistent with additional findings of the Board, and ordered* (1) that the Company cease and desist from discouraging membership in the I. W. A. or any other labor organization; interrogating employees; or in any other manner interfering with employees in the exercise of their rights under the Act; and (2) that the Company take the following affirmative action: Offer Hiram Peoples, Bennie Pearson and Paul Johnson reinstatement and make them whole in the manner provided in the Intermediate Report under the heading "The Remedy", and post a notice attached as Appendix A to the order. (R. 87-107.) Under "The Remedy" the Intermediate Report recommended that the Company make each of the three employees "whole for any loss of pay he may have suffered as a result of Respondent's discrimination against him by payment to each of a sum of money equal to that which he would have earned as wages from the date of discrimination[16] to the date of offer of rein-

* Reference to parts of the Board's decision and order relative to bargaining is omitted inasmuch as they were stricken from the decision and order by the Board's order amending the same. (R. 151-4.)

statement." Footnote 16 stated "in the case of Peoples * * * from that somewhat uncertain date * * * in spring or summer of 1949, where, absent discrimination, they (he) would have been recalled". (R. 136.)

The Board filed its petition for enforcement in the Court below on April 9, 1952. (R. 1-3.) On September 24, 1952 the Company filed in the Court below a motion for leave to adduce additional evidence with respect to the organization and existence from June 1, 1950 to the date of presentation of such evidence of a local union at its Greenville plant, organized and chartered by the I. W. A., the charging party in the complaint proceeding, and evidence of failure of said local union to comply with sections 9(f)(g) and (h) of said Act, in accordance with the procedure provided in section 10(e) of said Act, or in the alternative, that the Court order such additional evidence taken pursuant to a commission issued by the Court. (R. 155-9.) In support of this motion the Company submitted an affidavit of S. A. Smith, works manager of the plant, stating among other things, that on August 14, 1952 employees who were officers of the local union had stated to him that the local union had been reorganized by the I. W. A. in June of 1950 shortly after the hearing before the Trial Examiner, that he had seen the charter issued in July, 1950 to the local union by the I. W. A., that the local had held meetings, elected officers, collected dues, and intended to take part in contract negotiations, that the regional office of the Board in New Orleans had advised that it had no record that this local union had complied with sections 9(f)(g) and (h) of the Act, and that the Company had no notice or information of the reorganization and/or existence of said local union prior to August 14, 1952. There was incorporated in said affidavit a copy of that portion of the transcript of hearing before the Trial Examiner which contained testimony of

J. B. Hanna, International Representative of the I. W. A., that the charter of the local union had been revoked on October 21, 1949 and a statement to the Trial Examiner by the attorney for the General Counsel that this evidence was offered, "in that if there were a local in existence at that plant, they have to be in compliance before we would proceed with this case." (R. 167-8.)

The opinion of the Court below was filed on August 6, 1953. (R. 169-176.) The Court adhered to its prior decisions, to the effect that the initial charge authorized the Board to issue a complaint based upon any interference or discrimination which had occurred not more than six months prior to the filing of the initial charge, and rejected the Company's position that the original charge and amended charge were too indefinite to satisfy essential conditions for the issuance of a complaint under section 10(b) of said Act (R. 171), found that there was a lack of substantial evidence to support the Board's findings that the terminations of Bennie Pearson and Paul Johnson were discriminatory (R. 171), that there was substantial evidence to support the Board's inference that the failure to recall Peoples was due to his membership in and activities on behalf of the I. W. A. (R. 175), and on authority of *N. L. R. B.* v. *Dant*, 344 U. S. 375 denied the Company's motion for leave to adduce additional evidence on the ground that the proposed evidence would not be material to any issue before the Court. (R. 175-6.) Judgment was entered on August 6, 1953, accordingly. (R. 176-7.)

The Company filed a petition for rehearing on August 25, 1953. (R. 181-6.) It was denied on August 31, 1953. (R. 187.) On October 27, 1953 the Court below entered a decree enforcing the Board's order, as modified by the Court, over the Company's objection that enforcement of the Board's order to make Hiram Peoples whole was im-

proper inasmuch as neither the amount required to satisfy the decree nor essential facts for ascertaining said amount had been determined by the Board. (R. 184.)

REASONS FOR GRANTING THE WRIT.

Point 1. The decision of the Court below in the instant case on the first question presented in this petition with respect to the construction of the proviso in section 10(b) of the Labor Management Relations Act, 1947, is directly in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Indiana Metal Products Corp.* v. *N. L. R. B.*, 202 F. 2d, 613, 619 (Mar. 10, 1953) and the decision of the Court of Appeals for the Fourth Circuit in *Joanna Cotton Mills Co.* v. *N. L. R. B.*, 176 F. 2d 749, 754 (Aug. 10, 1949). It is also in conflict with the decision of the Court of Appeals for the Ninth Circuit in *N. L. R. B.* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 752 (Dec. 27, 1951). It is however, in accord with the decision of the Court of Appeals for the First Circuit in *N. L. R. B.* v. *Kobritz* (Star Beef Company), 193 F. 2d 8, 15 (Dec. 17, 1951) and the decision of the Court of Appeals for the Tenth Circuit in *Kansas Milling Co.* v. *N. L. R. B.*, 185 F. 2d 413 (Dec. 11, 1950).* In the *Kansas Milling Co.* case, however, there was an opinion concurring in part and dissenting in part by Pickett, Circuit Judge, stating at page 422, that the service of the charge "stays the statute of limitations of all charges which it contains and no more * * * to hold otherwise nullifies the limitations' statute if any kind of a charge has been filed." This direct conflict in the decisions of the Circuit Courts concerns the authority of the National Labor Relations Board to issue a complaint

* The decision of the Court below is also apparently in accord with a decision of the Court of Appeals for the Third Circuit in *N. L. R. B.* v. *Pennwoven, Inc.*, 194 F. 2d 521, 524 (Feb. 4, 1952) on question 1, but in conflict with that decision on question 2.

with reference to numerous unfair labor practices affecting interstate commerce which have occurred more than six months prior to the issuance of a complaint.

The decision of the Court below reaffirmed its decisions in *N. L. R. B.* v. *Cathey Lumber Company*,* 185 F. 2d 1021 (Jan. 22, 1951), affirming 86 N. L. R. B. 157, No. 30, *Stokely Foods, Inc.* v. *N. L. R. B.*, 193 F. 2d 736, 738-9 (Jan. 11, 1952) and *N. L. R. B.* v. *Westex Boot & Shoe Co.*, 190 F. 2d 12, 13-14 (June 25, 1951). These decisions and the decisions of the Circuits in accord therewith are based largely on the nature and function of a charge as stated by this Court in *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 369 (Mar. 4, 1940) and *Labor Board* v. *I. & M. Electric Co.*, 318 U. S. 9, 17 (Jan. 18, 1943). The last mentioned decisions, however, were rendered prior to the time that the statute required that a charge be served upon the party against whom the charge is made and before a charge served any function in connection with the so-called statute of limitations in section 10(b) of the Labor Management Relations Act, 1947. It appears therefore that the conflict between the decisions of the Circuit Courts on this question cannot be resolved until this Court determines the nature and function of a charge in a complaint proceeding under the present act.

The proviso in section 10(b) of the Act has commonly been referred to as a statute of limitations. *N. L. R. B.* v. *Itasca Cotton Mfg. Co.*, 179 F. 2d 504, 506 (C. A. 5, Jan. 30, 1950). It is, however, not a true statute of limitations, but provides essential conditions which are inherent elements in the Board's authority to issue a complaint. One of these conditions, requiring service of a copy of the

* On the hearing of the *Cathey Lumber Company* case before the Board, 86 N. L. R. B. No. 30, pp. 157, 158, the then General Counsel of the Board took the position on this question advocated by the petitioner herein.

charge upon the person against whom it is made, must obviously have been intended to acquaint such party with the unfair labor practice charged, otherwise only notice of the filing of the charge would have been required. The condition that no complaint shall be based upon any unfair labor practice occurring more than six months prior to the filing and service of a charge, indicates that it was contemplated that the complaint would issue on unfair labor practices stated in the charge. This is further indicated by the context of the sentence in which the proviso is inserted, which states, "Whenever it is charged that any person has engaged in or is engaging in any unfair labor practice, the Board * * * shall have power to issue * * * a complaint stating the charges *in that respect,* and containing a notice of hearing * * *, Provided," etc. (Emphasis added). This construction of the statute is in accord with the legislative history of the Act.*

The statute fixes no time limit within which a complaint may issue after a charge has been filed and served. If the construction given to the statute in the Court below in the instant case is correct, any Congressional purpose and intent by the proviso in the statute to limit the time within which a person must be apprised of unfair labor practices to which he may be required to respond is ef-

* The report of the House Committee on Education and Labor Report No. 245 on H. R. 3020, 80th Congress, first session, stated with respect to section 10(b): "A more important change is one that requires charging parties to file their charges within 6 months after the unfair practice is alleged to have occurred, and that requires the Administrator to issue the complaint within 6 months after the charge is filed. It has not been unusual for the Board, in the past, to issue its complaints years after an unfair practice was alleged to have occurred, and after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused. Allowing 6 months for filing a charge and another 6 months for the Administrator to act upon it does not seem unreasonable." (Legislative History of the Labor Management Relations Act, 1947, Volume 1, p. 331.)

fectively defeated. By a general charge of unfair labor practices within the meaning of certain sections of the statute, as in the instant case, and which states no identifiable unfair labor practice, all unfair labor practices of every nature which may have occurred within six months prior to the filing and service of the charge and which subsequently occur, may at any time thereafter be made the lawful basis for the issuance of a complaint.

The procedure followed by the Board under the construction given to the statute by the Court below is so contrary to natural justice and proper procedure that the question here presented has been litigated innumerable times before the Board and raised repeatedly on petitions for enforcement or review in the Courts of Appeals.* A decision of this Court finally determining the true intent and meaning of the statute is essential in the interest of orderly administrative procedure and to prevent needless litigation.

Point 2. This involves a variation of the construction of the Act discussed in point 1. An amended charge filed and served in April, 1949 (R. 16-20), alleged that Peoples had been discharged on February 6, 1949 and that the petitioner herein had refused to employ him for discriminatory reasons. A second amended charge (R. 20-23), filed a year later and at the time of issuing the complaint, stated that Peoples had been laid off on February 5, 1949 and that the petitioner herein had refused to employ him for like discriminatory reasons. The Board found that Peoples had not been discharged but lawfully laid off on February 5, 1949 and for proper reasons (R.

* In the Fifth Circuit, in addition to the three decisions reaffirmed in the decision below, the same question was litigated in *N. L. R. B.* v. *Royal Palm Ice Co.*, 193 F. 2d 569, 570 (C. A. 5, Jan. 11, 1952); *N. L. R. B.* v. *Atlanta Journal*, 187 F. 2d 13, and *N. L. R. B.* v. *Harris*, 200 F. 2d, 656, 658 (C. A. 5, Jan. 5, 1953).

126-8). The Court below found that the petitioner herein "was fully justified in laying off Peoples." (R. 174). Peoples had no right to reinstatement at the time of the filing and service of the amended charge. That right did not arise until May or June, 1949, at which time, according to the Board, the petitioner herein needed another to take his place (R. 127). The failure or refusal to employ Peoples in May or June for discriminatory reasons was a new violation. It did not relate to the alleged discharge on February 6, 1949 specified in the amended charge.* The action of the petitioner in laying off Peoples on February 5, 1949 was lawful and proper and no unfair labor practice existed at the time of the filing and service of the amended charge to which the unfair labor practice found by the Board could relate. To be sure, it could not have occurred if Peoples had not been laid off, but it could not have occurred if he had never been hired.

The decision of the Court below, which is in accord with its prior decision in *N. L. R. B.* v. *Harris*, 200 F. 2d 656, 658 (Jan. 5, 1953), is directly in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Indiana Metal Products Corp.* v. *N. L. R. B.*, 202 F. 2d 613, 619 (Mar. 10, 1953), in which it is stated:

> "* * * each event was subsequent to the filing and serving of the first charge and more than six months prior to the filing and serving of the amended charge.

* The following decisions hold that additional unfair labor practices may be alleged in the complaint if they relate to unfair labor practices alleged in a charge filed and served within the six months' period. *N. L. R. B.* v. *Somerset Classics, Inc.* (Modern Mfg. Co.), 193 F. 2d 613, 615 (C. A. 2, Jan. 14, 1952); *N. L. R. B.* v. *Gaynor News Company, Inc.*, 197 F. 2d 719, 721 (C. A. 2, June 24, 1952); *N. L. R. B.* v. *Dinion Coil Co.*, 201 F. 2d 484, 491 (C. A. 2, Dec. 24, 1952); *Cusano* v. *N. L. R. B.*, 190 F. 2d 898, 903 (C. A. 3, May 22, 1951); *N. L. R. B.* v. *Epstein*, 203 F. 2d 482, 485 (C. A. 3, April 15, 1953); *N. L. R. B.* v. *Vare* (McCarron Co.), 206 F. 2d 543 (C. A. 3, July 21, 1953); *N. L. R. B.* v. *Brown & Root, Inc.*, 203 F. 2d 139, 146 (C. A. 8, March 24, 1953).

> We hold that the Board was not warranted in basing a finding of unfair labor practice upon either of these occurrences."

This direct conflict between the decision of the Court below and the decision of the Court of Appeals for the Seventh Circuit concerns the authority of the Board to issue a complaint with respect to numerous unfair labor practices affecting interstate commerce which occur subsequent to the filing and service of a charge and should be finally resolved by a decision of this Court.

Point 3. The judgment and decree of the Court below enforcing the order of the Board that the petitioner herein make whole Hiram Peoples in the manner provided in the Intermediate Report of the Trial Examiner under the heading "The Remedy" was erroneous.

Under that heading in the Intermediate Report the Trial Examiner recommended that the petitioner herein make Hiram Peoples whole "for any loss of pay he may have suffered as a result of Respondent's discrimination against him by payment * * * of a sum of money equal to that which he would have earned as wages from the date of discrimination[16] to the date of offer of reinstatement." The date of discrimination has never definitely been determined. In Footnote 16 to the Intermediate Report that date is defined as "that somewhat uncertain date * * * in the spring or summer of 1949, where, absent discrimination, they (he) would have been recalled." (R. 136.)

The amount which the petitioner herein is required to pay to comply with the judgment and decree of the Court below cannot be ascertained until further proceedings have been had to compute the amount which Peoples would have earned had he been recalled. Before this computation can be made the Board must find the date on which Peoples

should have been recalled. No peremptory order with respect to back pay should be entered until such essential elements for the ascertainment of the amount due to him have been determined. *N. L. R. B.* v. *New York Merchandise Company,* 134 F. 2d 949, 952 (C. A. 2, Mar. 15, 1943).

The date on which the Company became obligated to recall Peoples must be determined by the Board itself. It should have been determined before the Board formulated its order that any payment be made. This Court has stated that such matters "should not be left for possible final settlement in contempt proceedings." *Phelps-Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 200. It is submitted that the judgment and order of the Court below was improper and that the question here presented involves an important phase of the administrative procedure of the Board which warrants the consideration of this Court.

Point 4. This involves a governmental policy of general public interest.

One of the purposes of the Labor Management Relations Act, 1947, is to remove obstructions to the free flow of interstate commerce resultant from "political strikes" instigated by Communists who infiltrate the management of labor organizations. *Communications Assn.* v. *Douds,* 339 U. S. 382. To accomplish this purpose the Act made compliance with section 9(h) essential before a labor organization could set in motion the processes of the Board. Congress intended not only to withdraw from the Board the power to employ its processes in aid of a noncomplying union but also to withhold from such organizations the benefits of the Act. *N. L. R. B.* v. *Postex Cotton Mills, Inc.,* 181 F. 2d 919, 920 (C. A. 5, May 5, 1950); *N. L. R. B.* v. *Case Company,* 189 F. 2d 599 (C. A. 8, June 5, 1951).

The Court below agreed "that the benefit of the Act may

not flow to a noncomplying labor organization" (R. 176) but failed to see its application in the instant case because the local union was not in existence when the complaint issued, which it construed to be the crucial time under the decision of this Court in *N. L. R. B.* v. *Dant*, 344 U. S. 375. It is the position of the petitioner herein that any construction which requires that the standards set up in the Act be met only on the date a complaint issues, is a perversion of the legislative intent.

The provisions of the Act are as applicable to the instant case, where the charging party is an international union and the noncomplying labor organization, its local, as to the case of a charging party which is an international union affiliated with a noncomplying congress or federation, which was the situation in *Labor Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322 (May 14, 1951). If this were not true the Congressional intent could be thwarted by a charge by the congress or federation in the case of a noncomplying national or international union, or by the national or international, as in the instant case, in which the noncomplying labor organization is the affiliated local union at the plant.

The local union is the point where a labor organization directly contacts the worker. The local customarily presents the labor organization's demands and initiates grievances. It is through the local that the policies and purposes of the national or international and congress or federation are effectuated. This Court has quoted with approval the language of both the Fourth and Fifth Circuits that the Congressional purpose is to "wholly eradicate and bar from leadership in the American labor movement *at each and every level*, adherents to the Communist party and believers in the unconstitutional overthrow of our Government." (Emphasis added.) *Labor Board* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325.

The I. W. A. established its local union at the Greenville plant shortly after it had been certified by the Board. It did not cause this union to come into compliance, however, until the Company moved to revoke its certification in February, 1949. The local's charter is alleged to have been withdrawn in October, 1949, but the petitioner herein sought leave to adduce evidence, as disclosed by the affidavit of S. A. Smith in support of its motion, that the I. W. A. had reorganized the local union within a few weeks after the close of the hearing before the Trial Examiner, and issued a charter to it in July, 1950, that thereafter the local union had from time to time elected officers, collected dues from members and held meetings, and was a constituent part of the I. W. A. acting as its local representative at the plant and that the local had not at any time complied with sections 9(f)(g) and (h) of the Act. (R. 160-8.) The situation of the local union in the instant case is the inverse of that of the congress, and the I. W. A. did not escape the statute by the device of invoking the processes of the Board by itself as the charging party, instead of at the local level.

The decision of the Court below that the date on which the complaint issued is the critical time under section 9(h) and that it is of no consequence that the local union was not in compliance during a major part of the proceeding, is inconsistent with the Congressional intent and purpose above stated. For a labor organization to have the benefits of the Act it is the clear intent of Congress that the requisites of compliance must be maintained. The Act cannot be circumvented by mere temporary compliance. If it be argued that continued compliance after the complaint has issued is not required by the literal wording of section 9(h), the doctrine of *United States* v. *American Trucking Association,* 310 U. S. 534, 543 is applicable. In

that decision this Court stated in effect that wherever the literal wording of a statute leads to absurd or futile results plainly at variance with the policy of the Act, courts should follow and apply the legislative purpose. Any contrary construction of the Act would operate to give the noncomplying labor organization the very remedies which the Act withdrew.*

This Court did not, in counsels' opinion, hold in *N. L. R. B.* v. *Dant,* 344 U. S. 375, that after the initial issuance of the complaint the noncompliance of a labor organization, which was the charging party, was in no way material. In that opinion this Court stated, page 382:

> "The argument is that the benefits of the Act may not flow to a labor organization unless the non-Communist affidavits are on file. We agree with the argument, and believe that it is in accord with our interpretation of § 9(h)."

This Court then pointed out that since the remedial processes of the Act can be invoked only by the issuance of a complaint it did not see how a noncomplying labor organization could be said to benefit from the filing of a charge, and that the filing of a charge, absent the issuance of a complaint, was a useless act. In the instant case, however,

---

* The Board's decision in *Isaac Andrews, et al.,* 87 N. L. R. B. 379 (which it overruled in *New Jersey Carpet Mills, Inc.,* 92 N. L. R. B. 604) was in accord with the construction of the Act advocated by the petitioner herein in complaints involving violations of section 8(a)(5).

In the *Andrews* case the Board stated "* * * To assert as do our dissenting colleagues, that these standards should be met only when it becomes necessary for a labor organization to resort to the Board is, in our opinion, a perversion of legislative intent. * * *"

Nothing in sections 9(f)(g) and (h) of the Act or in the Congressional history thereof, indicates an intention to make the distinction drawn by the Board in the *Andrews* case between section 8(a)(5) and other unfair labor practice cases, or between a charging party which is an international union and a so-called "background local."

the I. W. A. stands to benefit from the continued prosecution of the charge that the petitioner herein interfered with the concerted activities of its members and discriminated by failure to re-employ an officer of its noncomplying local union.

The comment of this Court in the *Dant* case with reference to the practical situation in maintaining compliance has no application in the instant case. This is not a situation of inadvertent noncompliance. The I. W. A. has demonstrated a careless, if not defiant, attitude with respect to the statute. Its top policy organization, the C. I. O., was not in compliance at the time of its certification. It did not require its local union to comply until after the Company moved to revoke its certification. It revoked the local union's charter prior to the issuance of the complaint but reorganized the local union shortly after the hearing on the complaint, and did not at any time require that the local union comply with sections 9(f)(g) and (h). It is respectfully submitted that this course of conduct disqualified the I. W. A. from availing itself of the processes of the Board, and by reason thereof the statute withdrew from the Board authority to proceed with the complaint, and that the Court below erred in denying the motion for leave to adduce additional evidence on the ground that evidence relating to the noncompliance of the local would not be material.

The status of a noncomplying local union is of such importance to employers generally and to the Board in its administration of the Act that the question here presented warrants full consideration by this Court.

CONCLUSION.

It is respectfully submitted that for the reasons hereinbefore set out, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES M. PRICE,
HAROLD D. BURGESS,
Attorneys for Petitioner.

November 24, 1953.

APPENDIX A.

The pertinent provisions of the National Labor Relations Act, 49 Stat. 449 (1935) as amended, 61 Stat. 136 (1947), 29 U. S. C. (Supp. 1952) § 141, *et seq.*, are as follows:

* * * * *

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such

employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9(f), (g), (h), and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Sec. 9: * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of sec-

tion 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing:

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws, showing the procedure followed with respect to (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor; and (B) can show that prior thereto it has:

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by

it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f)(A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f)(B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in and is not a member of or support any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

* * * * *

Sec. 10. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

* * * * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the Dis-

trict of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and

it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

* * * * *

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Questions presented	2
Statement	3
Argument	6
Conclusion	13

CITATIONS

Cases:

Gaynor News Company v. *National Labor Relations Board*, No. 7, this Term	7, 8, 9
Indiana Metal Products Corp. v. *National Labor Relations Board*, 202 F. 2d 613	6
Lane-Wells Co., 77 NLRB 1051	11
Marshall Field v. *National Labor Relations Board*, 318 U.S. 253	11, 12
Nathanson v. *National Labor Relations Board*, 344 U.S. 25	12
National Labor Relations Board v. *Bird Machine Co.*, 174 F. 2d 404	12
National Labor Relations Board v. *Cheney California Lumber Co.*, 327 U.S. 385	12
National Labor Relations Board v. *Dant*, 344 U.S. 375	6, 9, 10
National Labor Relations Board v. *Harris*, 200 F. 2d 656	7
National Labor Relations Board v. *New York Merchandise Co.*, 134 F. 2d 949	12-13
National Labor Relations Board v. *Royal Palm Ice Co.*, 201 F. 2d 667	12
National Labor Relations Board v. *Seven-Up Bottling Co.*, 344 U.S. 344	11, 12
National Labor Relations Board v. *Top Mode Manufacturing Co.*, 203 F. 2d 482, finding on petition for certiorari, No. 210, this Term	7
National Labor Relations Board v. *Wentworth Bus Lines, Inc.*, 191 F. 2d 849	12
Northern Crate & Lumber Co., 105 NLRB No. 22	10
Prudential Insurance Co., 81 NLRB 295	11
Sunbeam Corporation, 98 NLRB 525	11
Wallace Corp. v. *National Labor Relations Board*, 159 F. 2d 952	12

Statute:

	Page
National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*)	2
Section 8(a)(1)	4
Section 8(a)(3)	4
Section 9(f)	5, 6, 9, 10
Section 9(h)	5, 6, 9, 10
Section 10(b)	4, 5, 7, 8
Section 10(e)	11

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 483

UNITED STATES GYPSUM COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 169-176) is reported at 206 F. 2d 410. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 87-107) are reported at 94 NLRB 112. The Board's subsequent order (R. 151-154), amending its original decision and order, is reported at 97 NLRB 889.

JURISDICTION

The decree of the court below (R. 184-187) was entered on October 27, 1953. The petition for a

writ of certiorari was filed on November 27, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, 151, *et seq.*), are set forth in Appendix A to the Petition, pp. 25-31.

QUESTIONS PRESENTED

1. Whether a complaint issued by the Board's General Counsel may, under Section 10(b) of the Act, allege an unlawful refusal to rehire an employee where the violation occurs after the filing of the charge, which alleges a continuing failure to reinstate the employee, and more than six months prior to the filing of an amended charge which repeats that allegation.

2. Whether the Board may properly issue a decision and order in an unfair labor practice case involving violations of Section 8(a)(1) and (3) of the Act, where the charging union was in full compliance with the filing requirements of Section 9(f), (g) and (h) of the Act when the complaint and the order issued, but its local at the employer's plant, which did not come into existence until after the complaint issued, was not in compliance at the time the order issued.

3. Whether the Board's order requiring petitioner to make an employee whole for any loss of pay suffered by him as a result of petitioner's discrimination against him during the period "from

the date of discrimination to the date of offer of reinstatement" is not entitled to enforcement because the Board did not find, and the order failed to specify, the exact date on which the discrimination began.

STATEMENT

A. *Procedural background*—The original charge in this case was filed by the Union (International Woodworkers of America, C. I. O.) on February 21, 1949, alleging, *inter alia,* that petitioner had "interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the . . . Act" (R. 13). An amended charge was filed by the Union on April 25, 1949, which added to the above an averment that petitioner on or about February 6, 1949, had discriminatorily discharged an employee, Hiram Peoples, "and at all times since [his discharge, had] refused to employ [him]" because of his union activities (R. 18). Thereafter, on April 17, 1950, a second amended charge was filed which, in addition to making changes immaterial here, substantially reiterated the above allegations (R. 22). On April 17, 1950, the Board's General Counsel issued the complaint herein, alleging, *inter alia,* that petitioner had commited unfair labor practices by failing to reinstate employee Peoples, following a layoff, because of his union activities, and by interrogating and threatening its employees with respect to their union activities (R. 24, 26, 29). Petitioner answered the complaint by denying the commission of any unfair labor practice, and

a hearing was held on the issues thus raised (R. 32-39).

B. *The Board's decision and order*—Upon the evidence adduced at the hearing the Board (R. 88, 94-96) entered findings, not disputed here, that petitioner had violated Section 8(a)(1) and (3) of the Act by interrogating employees as to their attitude towards the Union and discriminatorily refusing to rehire Peoples. With respect to Peoples, the Board concluded that although petitioner had laid him off in February 1949 for economic reasons, and hence had not discriminated against him on that date, as averred in the first amended charge, it had failed to recall him in the spring of that year, when work became available, because of his Union activities and had thereby violated Section 8(a)(3) of the Act.[1]

In concluding that petitioner had unlawfully discriminated against Peoples, the Board rejected petitioner's contention that the finding of discrimination with respect to him was precluded under Section 10(b) of the Act because the second amended charge, which covered the period in which the discrimination found occurred, was filed more than six months subsequent to that unfair labor

---

[1]The Board also found that petitioner had discriminated against two other employees because of their Union activity and that it had unlawfully refused to bargain with the Union (R. 88-94, 96-102). Subsequently, in its amended order (R. 151-154), the Board dismissed the complaint insofar as it alleged that petitioner had unlawfully refused to bargain. The findings with respect to the other two employees were rejected as unsupported by the court below (R. 171) and no issue is presented here with respect to them.

practice. According to the Board, the allegation in the complaint and the finding with respect to petitioner's discriminatory refusal to recall Peoples were adequately supported by the original and the first amended charges, both of which were filed before the unfair labor practice was committed and which therefore were not defeated by the six-month limitation of Section 10(b) (R. 151-152).

To remedy the foregoing unfair labor practice, the Board issued its order requiring petitioner to cease and desist from its unlawful conduct; to reinstate Peoples and to make him whole for any loss of pay caused by the discrimination against him for the period from the date of discrimination to petitioner's offer of reinstatement; and to post appropriate notices (R. 102-105).

C. *The decision of the court below*—Upon proceedings to enforce the Board's order, the court below held (R. 169, 171, 174-175) that the Board's unfair labor practice findings described above were supported by substantial evidence and enforced the Board's order with respect to them. Like the Board, the court below rejected (R. 170-171) petitioner's contention that the allegations of the complaint were not properly supported by a timely filed charge.

In addition, the court below rejected (R. 175-176) petitioner's further contention that the complaint should have been dismissed because the Union had organized a local at petitioner's plant which had not complied with the filing requirements of Section 9(f) and (h) of the Act. This

contention was made in a motion to the court below for leave to adduce additional evidence (R. 155-159), by which petitioner sought to establish that the local had been chartered prior to issuance of the Board's Decision and Order, and that it had not filed the data required in Section 9(f) and (h). The court below (R. 175-176), noting that the Union was the charging party, that it had been in full compliance at the time the complaint was issued, and that the local was not in existence when the complaint was issued, denied the motion on grounds of immateriality. Relying on this Court's decision in *National Labor Relations Board* v. *Dant,* 344 U. S. 375, the court below held (R. 176) that "the date the complaint issued was the crucial time [for compliance] under Section 9(h)," and that therefore the requirements of that Section had been satisfied in this case.

ARGUMENT

1. As the Petition states (pp. 12, 16), the ruling of the court below that the Board has power to make findings with respect to unfair labor practices committed after the filing of the charge initiating the proceedings and more than six months prior to the filing of an amended charge, is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Indiana Metal Products Corp.* v. *National Labor Relations Board,* 202 F. 2d 613, 619. On the other hand, the ruling of the court below is supported by a decision of the Court of Appeals

for the Third Circuit [2] and an earlier decision of the Fifth Circuit.[3] Nevertheless, for the reasons stated below, the Board believes that certiorari should not be granted with respect to this question at the present time.

This question appears basically the same as one of the issues pending before the Court in *Gaynor News Company* v. *National Labor Relations Board*, No. 7, this Term. In the *Gaynor* case, the General Counsel of the Board, upon a charge filed by a single employee asserting that an unfair labor practice had been committed against him, issued a complaint alleging that the employer by the same action had discriminated against other employees similarly situated. Petitioner there, like petitioner here, argues that the language of Section 10(b) of the Act permits a complaint to allege as unfair labor practices only that conduct specifically identified by the charge. From this, petitioner in the *Gaynor* case urges that the Board could not properly include in the complaint any names, not also listed in the charge, of employees victimized by the employer's unlawful acts. In like vein, petitioner here urges that none of the charges filed in this case adequately supports the allegation in the complaint, or the Board's finding, that petitioner discriminatorily refused to rehire Peoples.

---

[2] *National Labor Relations Board* v. *Top Mode Manufacturing Co.*, 203 F. 2d 482, pending on petition for certiorari, No. 210, this Term. See the Board's Brief in Opposition, p. 10.

[3] *National Labor Relations Board* v. *Harris*, 200 F. 2d 656, 658.

Thus, the original and first amended charges are asserted to be inadequate because they were filed prior to the time of the discrimination found and therefore could not specifically cover the critical period, and the second amended charge because it was not filed within the six-month period prescribed by Section 10(b) (Pet. 12-17).[4]

As the foregoing indicates, the exact questions in the *Gaynor* case and here are not based upon identical factual situations—*Gaynor* testing the Board's view that a charge of unlawful conduct against a single employee will support a complaint against other employees similarly situated, and this case presenting the Board's view that a charge of unlawful conduct will support a complaint against such conduct although it occurs subsequent to the charge. Nonetheless, they both invoke the same basic construction of Section 10(b). For it is the Board's view, as discussed fully in its brief in the *Gaynor* case (pp. 44-55), that the limitation proviso to Section 10(b), adopted in 1947, was not intended to alter the established rule under the Wagner Act that the complaint was not limited to the violations alleged in the charge, but could embrace other violations uncovered by the Board in the course of

[4] The petition suggests (p. 3, n.) that only the second amended charge is relevant in this case because the notice of hearing, issued by the Board's regional director, stated that "the complaint is based" upon it (R. 31). However, this statement refers only to the fact, as both the second amended charge and complaint make clear, that certain of the allegations of the earlier charges had been omitted. Petitioner's insistence on drawing a different inference, unsuccessful before both the Board and the court below, raises no question warranting review by this Court.

investigating the charge. The proviso, in the Board's view, only precludes allegations in the complaint of any unfair labor practices occurring more than six months prior to the filing and service of the charge initiating the case. Accordingly, if this construction is approved by the Court in *Gaynor,* it will control the question petitioner has raised in this case. Similarly, a rejection of the Board's position in *Gaynor* might dispose of the present question. In these circumstances, we submit that the Court should retain the instant petition on its docket until it has decided the *Gaynor* case.

2. Petitioner's contention (Pet. 18-22) that the Board's order is invalid because it was issued at a time when the Union's local at petitioner's plant was not in compliance with the requirements of Section 9 (f) and (h) of the Act is insubstantial and does not warrant review by this Court. As petitioner concedes (Pet. 20), the local was not in existence at the time the complaint was filed, and the Union, the charging party, was then in full compliance with the Act's filing requirements. Under the decision of this Court in *National Labor Relations Board* v. *Dant,* 344 U. S. 375, no more was necessary to authorize the Board to process the case and issue its decision and order.

Section 9(h) of the Act states, in relevant part, that "no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board [a non-Communist] affidavit. . . ." Section 9(f) imposes the same limitation with re-

spect to the filing by the charging Union of specified operational and financial data. In the *Dant* case, this Court, resting its conclusion on the "particularity" with which the foregoing language specified the critical time for compliance, ruled that "the 'unless' clause limits the issuance of a 'complaint.' " 344 U. S. at 379, 380.

Accordingly, just as the carefully limited words of Section 9(f) and (h) could not be stretched to require compliance at the time of the filing of the charge in the *Dant* case, neither can they be stretched to require compliance at the time of the issuance of the Board's Decision and Order in this case.

Moreover, assuming *arguendo* that the statute requires compliance by the charging union both when the complaint and the Board's order issue, this condition is also met here. The Union, the charging party, was in compliance on both dates. The circumstance that the Union's local may not have been in compliance when the order issued is not controlling. The Act on its face does not require compliance by labor organizations *subordinate* to the charging party in order to make the statutory remedies available to the charging union, except where it has been proved that the charging party filed a charge on behalf of its subordinate as a subterfuge to circumvent the Act's filing requirements. *Northern Crate & Lumber Co.*, 105 NLRB No. 22. Obviously, no such claim can be advanced here for the Union's local did not come into exist-

ence until after charges were filed and the complaint issued.[5]

3. Petitioner's claim of invalidity of the back pay provision of the Board's order on the ground that the Board has not determined the precise dates with respect to which People's wage losses should be computed (Pet. 17-18) is not properly before the Court. Although the trial examiner's intermediate report recommended that provision be made in the order for reimbursing Peoples, petitioner did not raise before the Board the objection that it now presses to that recommendation.[6] Accordingly, petitioner cannot now assert that the court below erred in this respect, for Section 10(e) of the Act provides that "No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of

---

[5] Where, unlike here, the Board's order requires an employer to bargain with a labor organization, the Board normally conditions its operation upon the compliance status of any local to whose favor the order redounds. *Sunbeam Corporation*, 98 NLRB 525; *Prudential Insurance Co.*, 81 NLRB 295; *Lane-Wells Co.*, 77 NLRB 1051. This is done under the remedial authority of the Board, and is considered appropriate only in bargaining cases, where, unlike the reinstatement and cease and desist order in this case, the benefit of the order inures directly to the organization which represents the employees.

[6] Petitioner's blanket exception to all of the Intermediate Report's recommendations concerning the remedy (R. 82) of course does not suffice to preserve its present position. *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255. The first mention of this contention was made in the court below in the petition for rehearing (R. 180-181), which was denied without opinion (R. 184).

extraordinary circumstances." Petitioner makes no mention of any "extraordinary circumstances" which might excuse its failure in this case. See *National Labor Relations Board* v. *Seven-Up Bottling Company,* 344 U. S. 344, 350; *National Labor Relations Board* v. *Cheney California Lumber Co.,* 327 U. S. 385, 387-389; *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 255.

In any event, the contention is wholly without substance. The determination of the precise period of time for which reimbursement must be made to victims of an employer's discrimination is, contrary to petitioner's contention, properly relegated by the Board to the phase of an unfair labor practice case which follows the issuance of an enforcement decree.

Indeed, in approving the practice which petitioner now asserts to be invalid, this Court has expressly pointed out that the fixing of the specific dates for which an employer's back pay liability is incurred is a factor to be considered after an enforcement decree has been entered. *Nathanson* v. *National Labor Relations Board,* 344 U. S. 25, 29-30. See also *National Labor Relations Board* v. *Bird Machine Co.,* 174 F. 2d 404 (C.A. 1); *National Labor Relations Board* v. *Wentworth Bus Lines, Inc.,* 191 F. 2d 849, 850 (C. A. 1); *Wallace Corp.* v. *National Labor Relations Board,* 159 F. 2d 952 (C. A. 4); *National Labor Relations Board* v. *Royal Palm Ice Co.,* 201 F. 2d 667, 668 (C. A. 5). *National Labor Relations Board* v. *New York*

Merchandise Co., 134 F. 2d 949, 952 (C.A. 2), relied upon by petitioner, scarcely supports its position, for the Court there decided that an enforcement decree might properly precede further proceedings before the Board to ascertain the amount of back pay owed by the employer. 134 F. 2d at 951-952.

CONCLUSION

For the foregoing reasons, we respectfully suggest that, insofar as the first question herein is concerned, this Court retain the present petition on its docket pending decision in *Gaynor News Company* v. *National Labor Relations Board*, No. 7, this Term. The second and third questions herein present no issues warranting review, and the petition should in any event be denied as to them.

ROBERT L. STERN,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
DUANE B. BEESON,
Attorney,
National Labor Relations Board.

DECEMBER, 1953.

☆ U. S. GOVERNMENT PRINTING OFFICE 1953 283704 710

37

FILED
JAN 30 1954
HAROLD B. WILLEY, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 483

UNITED STATES GYPSUM COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY OF PETITIONER.

CHARLES M. PRICE,
HAROLD D. BURGESS,
Attorneys for Petitioner,
134 South La Salle Street,
Chicago 3, Illinois.

Of Counsel:
MACLEISH, SPRAY, PRICE & UNDERWOOD,
134 South La Salle Street,
Chicago 3, Illinois.

THE DUNTHORP-WARDEN PRINTING COMPANY, CHICAGO

INDEX.

PAGE

The Board's restatement of questions presented in the Petition 1

The conflict of authorities on Question 2..... 2

The Gaynor case involves different issues..... 2

Question 1 does not involve a continuing violation.... 4

The conflict of authorities on Question 1..... 4

Question 3 arose after the application for enforcement 5

Question 3 has substance and merits consideration by this Court 6

CITATIONS.

Cases.

Gaynor News Company, Inc. v. National Labor Relations Board, No. 7, October Term 1953.....2, 3, 5

Indiana Metal Products Co. v. National Labor Relations Board, 202 F. 2d 613, 619 (C. A. 7, March 10, 1953) 2

Joanna Cotton Mills Co. v. National Labor Relations Board, 176 F. 2d 749, 754 (C. A. 4, August 10, 1949) 4

Kansas Milling Co. v. National Labor Relations Board, 185 F. 2d 413, 422 (C. A. 10, Dec. 11, 1950)..... 5

Nathanson v. Labor Board, 344 U. S. 25, 29-30..... 7

National Labor Relations Board v. Globe Wireless, Ltd., 193 F. 2d 748, 752 (C. A. 9, Dec. 27, 1951).... 4

National Labor Relations Board v. Prigg, 172 F. 2d 948, 949 (C. A. 5, Feb. 25, 1949)..... 7

National Labor Relations Board v. Top Mode Manufacturing Co., 203 F. 2d 482, 485 (C. A. 3, April 15, 1953) 3

Phelps-Dodge Corp. v. Labor Board, 313 U. S. 177, 200 7

Top Mode Manufacturing Co. (Epstein) v. National Labor Relations Board, on petition for certiorari, No. 210, October Term, 1953..... 3

Statute.

Section 10(b), Labor Management Relations Act, 1947 (61 Stat. 146, 29 U. S. C. A., Sec. 160, Supp. 1953).. 2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 483.

UNITED STATES GYPSUM COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY OF PETITIONER.

The National Labor Relations Board endeavored to restate in its Memorandum the questions presented in the Petition. It restated, however, only three of the four questions in the Petition, making no mention of Question 1. Question 1 in the Memorandum for the Board apparently was intended to present the issues under both Questions 1 and 2 in the Petition, but Question 1 in the Memorandum is based on a factual situation found only in Question 2 in the Petition, *i. e.*, that the circumstances under which the Board found Petitioner should have re-employed Hiram Peoples did not arise until some time subsequent to the filing and service of the amended charge but more than six months prior to the filing and service of the second amended charge upon which the complaint issued.

The Board confirms the conflict on this question (Question 2 in the Petition) between the decision of the court below and the decision of the Court of Appeals for the Seventh Circuit in *Indiana Metal Products Co.* v. *National Labor Relations Board,* 202 Fed. 2nd 613, 619. It suggests that certiorari should not be granted with respect to this question at this time but that the Petition be held on the docket pending the decision in *Gaynor News Company, Inc.* v. *National Labor Relations Board,* No. 7 this Term, for the stated reason that the construction given by this Court to Section 10 (b) of the Act in the *Gaynor* case may decide the present petition. It would appear, therefore, that the Board desires that the conflict on this question be resolved by this Court, if it is not decided in the *Gaynor* case.

Petitioner is of the opinion, however, that the issues presented under Question 2 in the Petition are not basically the same as those in *Gaynor News Company, Inc.* v. *National Labor Relations Board,* No. 7 this Term. In that case, certain benefits given to union employees under a contract with a union were not given to a non-union employee who filed a charge stating that fact. More than six months later an amended charge was filed and served which questioned for the first time the validity of the contract with the union and charged that the Gaynor News Company, Inc., had similarily discriminated against other employees not named. Unlike the instant case, however, the charge filed within the statutory period stated facts that had actually occurred and upon which the complaint was based, with the exception of the names of other employees similarly situated. The petitioner in the *Gaynor* case argued that the Act did not empower the Board to solicit litigation on behalf of individuals, nor to commence litigation on behalf of unnamed persons, and that a class suit is a particularized form of action which the Board does not

have the power to institute without express authority under the statute. It also argued that the violation had to be proven as to each unnamed employee and that in the case of each individual the petitioner had the right to cross-examination. (See Brief for Petitioner, Point IV, pages 39-42, No. 371, October Term 1952). These are not issues involved in the present petition.

The Board states (page 7) that the ruling of the court below is supported by a decision of the Court of Appeals for the Third Circuit in *National Labor Relations Board* v. *Top Mode Manufacturing Company*, 203 Fed. 2nd 482, 485, pending on petition for *certiorari*, No. 210 this Term. In that case the Court of Appeals for the Third Circuit held that the subsequent violations related to unfair labor practices alleged in a charge filed and served within the statutory period (see footnote, page 16 of the Petition herein). In the instant case, however, the violation stated in the amended charge filed within the statutory period alleged a discriminatory discharge of Hiram Peoples which was not well founded. Peoples was not discharged but lawfully laid off.[1] At the time of filing and service of the amended charge no discrimination against Peoples or any other employee had occurred to which the subsequent failure to employ Peoples charged in the second amended charge and found by the Board could relate.

The Board refers (Page 8) to its brief in the *Gaynor* case. It is not feasible for Petitioner in this reply to answer all contentions on the construction of Section 10 (b) advanced by the Board in the full argument of that case. Petitioner calls attention, however, to the fact that a number of the decisions under the present Act cited by the Board on this point sustained the Board's authority to issue a complaint on the unfair labor practices then in

1. The court below found that Petitioner "was fully justified in laying off Peoples" (R. 174).

question on the ground that they related to unfair labor practices in a charge filed and served within the statutory period. The basis of these decisions is not consistent with the Board's position that after any charge has been filed and served, it may issue a complaint based on unfair labor practices without limitation whatsoever as to the nature thereof, provided the violations occurred within six months of the filing and service of the initial charge.

Question 1 in the Memorandum for the Board refers to a continuing violation. This particular phrasing of the question is misleading. Having been lawfully laid off for an indefinite period Peoples had no legal right to demand employment until such time as his services might be needed. Conversely, there was no obligation on the Petitioner to employ Peoples unless and until his services were needed. The Board found that the need for his services arose some time later. At the time of the filing and service of the amended charge there had been no violation or discrimination against Peoples and until such violation occurred there could be no continuing violation with reference to his employment.

The Board makes no comment concerning the conflict between the decision of the court below on Question 1 in the Petition and the decision of the Court of Appeals for the Fourth Circuit in *Joanna Cotton Mills Co.* v. *National Labor Relations Board,* 176 Fed. 2nd 749, 754, and the decision of the Court of Appeals for the Ninth Circuit in *National Labor Relations Board* v. *Globe Wireless, Ltd.,* 193 Fed. 2nd 748, 752. Question 1 in the Petition involves a factual situation substantially different from that in the *Gaynor* case. In the instant case the original and amended charges filed within the statutory period stated that Petitioner had engaged in unfair labor practices within the meaning of Section 8 (a) (1) and had interfered with,

restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act but alleged no facts or particular violation found by the Board which might be enlarged or expanded into a charge of interrogation of employees. Petitioner had no notice that it would be required to respond to the charge of interrogation until a year later when the complaint issued charging Petitioner with such violations. The decision in the *Gaynor* case will not decide Question 1 in the instant petition unless this Court determines a question not directly involved in that case, *i. e.*, whether the provisions of the statute are met (the so-called statute of limitations stayed) if any kind of a charge has been filed within the statutory period. To hold in the affirmative will have the effect, as stated by Judge Pickett in his dissenting opinion in *Kansas Milling Co.* v. *National Labor Relations Board,* 185 Fed. 2nd 413, 422 (C. A. 10), of nullifying the statute.

The Board explains that the paragraph in the notice of hearing issued by the Board, which states, "A copy of the Second Amended Charge upon which the Complaint is based, is attached hereto" (R. 31), "refers only to the fact, as both the second amended charge and complaint make clear, that certain of the allegations of the earlier charges had been omitted." (Memorandum for the Board, Footnote 4 Page 8.) If that was the purpose of this paragraph it could be ascertained only by a process of deduction. There was no mention whatsoever of the original charge or amended charge in either the complaint or notice of the hearing thereon. The complaint did, however, omit the specific unfair labor practices alleged in the earlier charges and allege unfair labor practices based on the second amended charge.

The Board states that Petitioner's claim of invalidity of the back pay provision of the Board's order is not properly before the Court for the reason that Petitioner did not

raise the question before the Board. (Memorandum for Board p. 11.) Petitioner makes no claim that the Board's order for back pay was invalid. Petitioner contends that the Court of Appeals should not have granted enforcement of this part of the Board's order until the Board had determined at least the essential facts prerequisite to the determination of the amount which Petitioner is required to pay to Peoples in order to comply with the enforcement order. This question did not arise until the Board made application for enforcement. There was no occasion to raise it before the Board.

The determination of the date upon which Petitioner should have employed Peoples is not a simple matter. The evidence in the record before the Board was insufficient for that purpose. The Trial Examiner defined the date of the discrimination as "that somewhat uncertain date * * * in the spring or summer of 1949, where, absent discrimination, * * * (he) would have been recalled." (Footnote 16, R. 136.) The only evidence of this date in the record before the Board is a list of the employees released and hired in the fabricating department at Petitioner's plant during the period from January 1, 1949 through September 1, 1949 (General Counsel's Exhibit 14, Appendix to the Board's Brief, pp. 193, 203-8) from which the Board found that by July 31, 1949 Petitioner had employed more employees in this department than were employed at the time of Peoples' layoff (R. 95). The evidence on the hearing before the Trial Examiner was directed principally to the reason why Peoples had been included among the employees laid off and the record contains practically no evidence with reference to the work for which new employees were subsequently hired.

The definite date of the discrimination found by the Board is an essential fact which must be determined by the

Board. When the Board adopted the Trial Examiner's finding that this was an "uncertain date," it in effect retained jurisdiction to determine the date of the discrimination prior to proceedings to fix the amount required to make Peoples whole. *National Labor Relations Board* v. *Prigg,* 172 Fed. 2nd 948, 949 (C. A. 5, February 25, 1949). Pending determination of the date of discrimination and the amount to be paid, there should have been no enforcement of that part of the Board's order. This Court has held that such a matter should be "left to the Board for determination by it prior to formulating its order and should not be left for possible final settlement in contempt proceedings." *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 200.

Paragraph 2 (b) of the decree entered by the court below directed Petitioner to make whole Hiram Peoples in the manner provided in the Intermediate Report of the Trial Examiner (R. 184, 185). On its face this is a peremptory order. If, nevertheless, as the Board apparently contends, Petitioner is not obligated to comply with this paragraph of the decree unless and until the Board has found the date of discrimination against Peoples and the specific sum to be paid to him and this sum has been incorporated in the decree by supplemental order, this provision not only conflicts with the decision of this Court in *Phelps Dodge Corp.* v. *Labor Board, supra,* but serves no purpose. The method by which Petitioner might secure review of the subsequent proceeding by the Board is uncertain. Neither the statute nor the Rules and Regulations of the Board provide for such further proceedings. Petitioner respectfully submits that Question 3 in the Petition has substance and merits consideration by this Court.

The decision of this Court in *Nathanson* v. *Labor Board,* 344 U. S. 25, 29-30, cited by the Board, is fully consistent

with Petitioner's position on this question. That decision, insofar as it has any application to the instant case, held that prior to the final disposition of an unliquidated claim against a bankrupt employer for back pay awarded by the National Labor Relations Board the District Court should refer the claim to the Board for liquidation, giving the Board a reasonable time for its administrative determination.

Respectfully submitted,

CHARLES M. PRICE,
HAROLD D. BURGESS,
Attorneys for Petitioner.

January 28, 1954.